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October 23, 2006

Thomas J. Andersen  
Office of the General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Re: Matter Under Review 5598

Dear Mr. Andersen:

Enclosed is the Utah Republican Party's ("URP") response to the letter dated August 18, 2006 from FEC Chairman Michael Toner to Kevin Anderson and the accompanying Factual and Legal Analysis. We also have attached copies of two amended affidavits for Joseph A. Cannon and Spencer Jenkins, which respond more adequately to the Commission's inquiry in light of the Factual and Legal Analysis. We will be sending you the original, notarized affidavits in the mail.

As per my voicemail message today, we will provide a detailed response to the Federal Election Commission's Subpoena to Produce Documents and Order to Submit Written Answers in MUR 5598 no later than Monday, October 30, 2006.

If you have any questions, please contact me at 202-862-7806.

Sincerely,

Audrey Perry



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**BEFORE THE  
FEDERAL ELECTION COMMISSION**

In the Matter of:

Complaint Filed By Utah  
Democratic Party

MUR No. 5598

**RESPONSE OF THE UTAH REPUBLICAN PARTY AND ITS CHAIR,  
JOSEPH A. CANNON**

No action should be taken against the Utah Republican Party (the "URP") or its officers or directors, including its chair, Joseph A. Cannon in this matter, and the Complaint should be dismissed, because there was no violation of federal election laws or regulations. The campaign materials and mailings (the "Subject Mailings") referenced in the Complaint were created, distributed and paid for in accordance with federal campaign finance law. The Subject Mailings were developed and distributed in compliance with FEC regulations concerning non-allocable mail according to 11 C.F.R. § 100.87 and 11 C.F.R. § 100.147; they were hand stamped, processed, and loaded into delivery trucks by volunteers, thus qualifying the mailings under the volunteer materials exemption. The Subject Mailings were paid for by the URP with federal dollars, using the proper disclaimer and postage permit. The Subject Mailings were not coordinated with either the National Republican Congressional Committee or the Swallow for Congress Committee.

**STATEMENT OF FACTS**

1. The media quotes relied on in the Complaint are inaccurate. Joseph A. Cannon, chairman of the URP, responded spontaneously to certain questions from the media without the opportunity to investigate or even review the relevant facts and circumstances. Cannon Aff. ¶ 4. A signed affidavit from Cannon is attached.
2. Attached is a signed affidavit of Spencer Jenkins, Former Executive Director of URP.
3. The Subject Mailings were prepared and processed in a manner to qualify for the volunteer materials exemption, because volunteers played an active and significant role in the mailing program. Jenkins Aff. ¶ 4.
4. The URP organized volunteers to process, sort, hand-stamp, and deliver the Subject Mailings so that there would be clear involvement from volunteers in the distribution of the Subject Mailings consistent with FEC rules and regulations concerning non-allocable mailings. Cannon Aff. ¶ 8.

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5. Volunteers stamped each piece of mail with non-profit postage indicia and loaded the mail in delivery trucks that assisted in the delivery of the mail to the post office. Volunteer involvement was documented and the pictures and log-in sheets reflecting the volunteer involvement have previously been filed with the Federal Election Commission, attached to the initial response of the URP. Jenkins Aff. ¶ 5.

6. Arena Communications designed the brochures, sorted the data, printed the addresses on the envelopes, and packaged the materials. That is what is reflected in the Arena Communications billings. However, afterwards, the volunteers hand stamped the mail and loaded the mail in the delivery trucks that assisted in the delivery of the mail to the post office. Jenkins Aff. ¶ 7.

7. The URP hired Arena Communications to ensure that everything involving the Subject Mailings was done in accordance with federal law. Cannon Aff. ¶ 6.

8. The URP followed the procedures outlined in the Victory 2004 Guidelines provided by the RNC's legal counsel's office to qualify for the volunteer exemption. Jenkins Aff. ¶ 8.

9. No NRCC workers were brought to Utah from out of state to work on the Subject Mailings. The URP brought in some volunteers to assist the party's generic Get-Out-The-Vote activity. Permissible travel and subsistence expenses of such volunteers were paid with federal dollars from appropriate federal accounts. No wages were paid to volunteers. Cannon Aff. ¶ 11.

10. The Subject Mailings were not coordinated with the NRCC. Jenkins Aff. ¶ 10; Cannon Aff. ¶ 10, 12.

11. The Subject Mailings were not coordinated with the Swallow for Congress Committee. Jenkins Aff. ¶ 10-14; Cannon Aff. ¶ 12.

12. The URP did not discuss the Subject Mailings or issues raised in the mailings with members of the Swallow for Congress Committee before they were distributed. Jenkins Aff. ¶ 11; Cannon Aff. ¶ 13.

13. No one from the Swallow for Congress Committee was involved in the creation, production, or distribution of the Subject Mailings. Jenkins Aff. ¶ 12; Cannon Aff. ¶ 14.

14. The information contained in the Subject Mailings was all publicly available information and was not provided to the URP or Arena from the Swallow for Congress Committee. Jenkins Aff. ¶ 13.

15. The URP used its own mailing list to address and distribute the Subject Mailings. Jenkins Aff. ¶ 14.

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16. Although the Swallow for Congress Committee also occasionally used Arena Communications' services, Arena did not use, or convey to the URP, any information about the Swallow Committee's plans, projects, activities or needs to which it was privy as a result of its role as a vendor to the Swallow Committee in these Subject Mailings. Jenkins Aff. ¶ 15.

### LEGAL ANALYSIS

The Utah Democratic Party's Complaint alleges three violations: (1) the subject mailings are not exempt under 11 C.F.R. §§ 100.87 and 100.147; (2) the subject mailings were not prepared by volunteers, but by paid staff; and (3) the NRCC paid for the Subject Mailings. None of these claims is factually or legally accurate.

The Commission has asked for an expanded factual and legal analysis of two issues: (1) whether the Subject Mailings were coordinated with the Swallow For Congress Committee through Arena Communications; and (2) whether the Subject Mailings are exempt under 11 C.F.R. §§ 100.87 and 100.147.

#### **1. The URP did not coordinate with Swallow for Congress Committee.**

The Subject Mailings were not coordinated with the Swallow for Congress Committee. In order for a communication to be considered a "coordinated communication" with a candidate, a candidate's authorized committee, or their agents, a state party's public communication must meet a three prong test: (1) payment by a political party or its agent; (2) satisfaction of one of the content standards set forth at 11 C.F.R. § 109.37(a)(2); and (3) satisfaction of one of the conduct standards set forth in 11 C.F.R. § 109.21(d).

The URP does not dispute that it paid for the Subject Mailings, thus the first prong of the test is met. See Cannon Aff. ¶ 7. The URP also does not dispute that the second prong of the coordination test is met, and recognizes that the Subject Mailings were "public communications" under 11 C.F.R. § 100.26, and meet the content criteria set forth in 11 C.F.R. § 109.37(a)(2)(iii)(A)-(C).

However, the Subject Mailings were not coordinated communications because they did not meet the conduct standards set forth in 11 C.F.R. § 109.21(d). The Commission has requested further information about whether URP coordinated with Swallow for Congress Committee on the Subject Mailings through Arena Communications, specifically, whether Arena and URP acted in a way that would satisfy the "common vendor" test of 11 C.F.R. § 109.21(d)(4).

URP did contract with Arena, a commercial vendor who also provided political services to the Swallow for Congress Committee, to produce the Subject Mailings, thus satisfying the first two tests of a common vendor coordination under 11 C.F.R. §

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109.21(d)(4)(i) and (ii). The most important prong of the common vendor regulation; however, was not satisfied by Arena's actions.

11 C.F.R. § 109.21(d)(4)(iii) requires that the commercial vendor "uses or conveys information about the candidate's campaign plans, projects, activities, or needs" where that information is material to the creation, production, or distribution of the communication. Arena did not use, or convey to the URP, any information about the Swallow Committee's "plans, projects, activities or needs" to which it was privy as a result of its role as a vendor to the Swallow Committee. Furthermore, Arena did not use or convey information it had used previously in the course of its work for the Swallow Committee in the production of the Subject Mailings. 11 C.F.R. § 109.21(d)(4)(iii)(A) and (B); see Cannon Aff. ¶ 17, Jenkins Aff. ¶ 15.

The common vendor coordination requirement is met only in "situations in which the vendor assumes the role of a conduit of information between a candidate" and "the person making or paying for the communication," as well as in "situations in which the vendor makes use of the information received from the candidate or political party committee without actually transferring that information to another person." 68 Fed. Reg. 436-437 (Jan. 3, 2003). Arena did not act as a conduit of information between the Swallow Committee and the URP. Furthermore, Arena did not use any of the information it obtained in working for the Swallow Committee in the production of the Subject Mailings. See Cannon Aff. ¶ 15-17, Jenkins Aff. ¶ 13-15.

Arena is one of only a handful of Utah companies that is capable of providing the sort of specific political services required by URP and the Swallow Committee. The fact that the Swallow Committee used Arena as a vendor should not taint the company, making it unable to serve any other political committees or parties for fear of its services being considered coordinated communications and thus rendered an impermissible contribution. See 68 Fed. Reg. 436-437 (Jan. 3, 2003).

The Commission has determined that the "mere presence of a common vendor" does not "presume coordination." *Id.* In fact, the Commission has clearly stated that the regulations should not be interpreted as any sort of "prohibition" on the use of common vendors. *Id.* at 437. The Commission has explained that "even those vendors who provide one or more of the specified services are not in any way prohibited from providing services to both candidates or political party committees and third-party spenders." *Id.* The Commission clarified that the common vendor regulation focuses on the "sharing of information about plans, projects, activities, or needs of a candidate or political party through a common vendor to the spender who pays for a communication that could not then be considered to be made 'totally independently' from the candidate." Arena's work for URP was done "totally independently" from the Swallow Committee, thus Arena does not qualify as a "common vendor" under 11 C.F.R. § 109.21(d)(4)(iii). See Cannon Aff. ¶ 15-17, Jenkins Aff. ¶ 13-15.

Furthermore, the URP did not meet the "coordinated communications" conduct standard of 11 C.F.R. § 109.21(d) in any other manner, and thus the URP Subject

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Mailings cannot be considered as "coordinated communications" with the Swallow Committee. The Subject Mailings were not created or distributed at the request or suggestion of anyone from the Swallow for Congress Committee. Cannon Aff. ¶ 12, Jenkins Aff. ¶ 10; see 11 C.F.R. § 109.21 (d)(1). The URP did not discuss the Subject Mailings or issues raised in the mailings with members of the Swallow for Congress Committee before they were distributed. Cannon Aff. ¶ 13, Jenkins Aff. ¶ 11. See 11 C.F.R. § 109.21 (d)(3). No one from the Swallow for Congress Committee was involved in the creation, production, or distribution of the Subject Mailings. Cannon Aff. ¶ 14, Jenkins Aff. ¶ 12. See 11 C.F.R. § 109.21 (d)(2).

Furthermore, the information used to produce the Subject Mailings was all publicly available information, as defined by 11 C.F.R. § 109.21(d)(4)(iii), and thus does not satisfy the "common vendor" coordination requirements. Cannon Aff. ¶ 15, Jenkins Aff. ¶ 13. See 11 C.F.R. § 109.21 (d)(2), (3), (4), and (5); FEC Explanation and Justification, 71 Fed. Reg. 33,205 (June 8, 2006); 2002 Coordination Final Rules, 68 Fed. Reg. 432-434; H.R. Conf. Rep. No. 94-1057, at 38 (1976). The statistics used in the mailings are public U.S. Census Data for the state of Utah. The fact that Jim Matheson supported H.R. 1684, the Student Adjustment Act of 2003 that amended "the Immigration and Nationality Act to cancel the removal and adjust the status of certain alien college-bound students who are long-term U.S. residents" was also publicly available in the Congressional Record. The information about Matheson's vote for the H.R. 1, the Prescription Drug and Medicare Improvement Act, was also publicly available in Congressional materials. Furthermore, the mailing list used by URP to distribute the mailings was not provided to URP by Arena or shared with the Swallow Committee. Cannon Aff. ¶ 15, Jenkins Aff. ¶ 13. See 11 C.F.R. § 109.21 (d)(2), (3), (4), and (5).

## **2. The Subject Mailings were prepared by volunteers and qualified for the Volunteer Materials Exemption**

The purpose of the volunteer materials exemption is to "encourage volunteers to work for and with local and State political party organizations." H.R. Rep. No. 422, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess. 9 (1979). The volunteer exemption was enacted as part of the 1979 Amendments to FECA to "encourage grassroots participation in the political process." According to the legislative record, the volunteer exemption was passed to address the "undue" restrictions on the "role of political parties in Federal election campaigns" and to encourage individual political participation with state and local party organizations, like the URP. See S. Rep. No. 96-319 (1990).

The Subject Mailings were prepared and processed in a manner to qualify for the volunteer materials exemption, because volunteers played an active and significant role in the mailing program. Jenkins Aff. ¶ 4. The URP organized volunteers to process, sort, hand-stamp, and deliver the Subject Mailings so that there would be clear involvement from volunteers in the distribution of the Subject Mailings consistent with FEC rules and regulations concerning non-allocable mailings. Cannon Aff. ¶ 8.

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Volunteers stamped each piece of mail with non-profit postage indicia and loaded the Subject Mailings into trucks that assisted in the delivery of the mail to the post office. Jenkins Aff. ¶ 5. Volunteer involvement was documented and the pictures and log-in sheets reflecting the volunteer involvement have previously been filed with the Commission, attached to the initial response of the URP. *Id.*

The URP hired Arena Communications, a well-known political mailing vendor, to ensure that everything involving the Subject Mailings was done in accordance with federal campaign finance law and that the mailings would qualify under the volunteer exemption. Jenkins Aff. ¶ 6. The URP relied on Arena to make sure the requirements of the law were all fulfilled.

Arena Communications designed the brochures, sorted the data, printed the addresses on the envelopes, and packaged the materials. That is what is reflected in the Arena Communications billings. However, afterwards, the volunteers hand stamped the mail, loaded the mail in the delivery trucks that assisted in the delivery of the mail to the post office. Jenkins Aff. ¶ 7. The URP carefully followed the procedures outlined in the Victory 2004 Guidelines provided by the RNC's legal counsel's office to qualify for the volunteer exemption, a copy of which was attached to URP's first response to the Commission. Jenkins Aff. ¶ 8.

The Commission has considered several factors to determine whether mailings qualify under the volunteer exemption. In MUR 3218, the Commission found that whether volunteers stamped the Party's bulk mail indicia on the mailers was an important factor in determining the application of the exemption. MUR 3218 (May 1991). In that Matter, the fact that it appeared volunteers had stamped the Party's bulk mail indicia on the mailers was an important factor considered by the Commission as a positive factor in the application of the exemption. *Id.* at 3. Volunteers were solely responsible for stamping the URP's bulk indicia on the Subject Mailings. Jenkins Aff. ¶ 5.

In MUR 4471, the Commission found that since volunteers "affixed labels onto the brochures, sorted, bundled, and delivered the brochures to the post office," the mailings qualified under the volunteer materials exemption. MUR 4471 (Dec. 1998). Similarly, in this situation, URP volunteers processed, sorted, hand-stamped the non-profit indicia onto each piece of mail, and loaded the mail for distribution. Cannon Aff. ¶ 8.

Because volunteers played an active and significant role in the mailing program, the mailings should qualify for the volunteer materials exemption. The significant volunteer involvement with the Subject Mailings fulfilled the statutory purpose of the law by encouraging "volunteers to work for and with local and State political party organizations." H.R. Rep. No. 422, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess. 9 (1979).

### CONCLUSION

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No action should be taken against the Utah Republican Party or its officers or directors, including its chair, Joseph A. Cannon in this matter, and the Complaint should be dismissed, because there was no violation of federal election laws or regulations.

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